In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1396

CARMINE LOMBARDOZZI, PETITIONER

v.

UNITLD STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, his brother, and others were indicted in the United States District Court for the Eastern District of New York for causing the interstate transportation of a stolen check worth more than $5000, in violation of 18 U.S.C. 2314, and for conspiracy to commit that offense, in violation of 18 U.S.C. 371. Near the close of the government's case, after petitioner had been implicated by the government's principal witness Negri,[1] petitioner approached the assistant United States Attorney and said he would like

[1] The trial is described in *United States* v. *Mingoia*, 424 F. 2d 710 (C.A. 2).

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to plead guilty. He was told to consult his counsel. (App. 52–53).[2]

In conferences before the judge on March 7 and 10, 1969 (G. App.), the judge told government and defense counsel that, even though the government did not oppose probation for petitioner's brother and a direction that any sentence for petitioner be served concurrently with a state sentence, he would not agree to impose such sentences (G. App. 3–4, 13, 16, 19, 20). Before petitioner and his brother pleaded guilty on March 12, 1969, the judge made clear to them personally that it was unlikely that he would grant probation to Daniel (App. 24) and that he would leave it to the discretion of the Attorney General whether petitioner's federal sentence would be served concurrently with an anticipated state sentence (App. 32–33). The court conducted a full inquiry under Rule 11, F.R. Cr. P., before accepting the plea to one count of the indictment (App. 35–41).

After Daniel had been sentenced to imprisonment for two years and before petitioner himself had been sentenced,[3] petitioner made a motion to withdraw his plea of guilty on the ground that he was not guilty and that his plea had been motivated by the assurance of government counsel and an F.B.I. agent that he would not have to serve time in a federal penitentiary.

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[2] App. refers to petitioner's appendix in the court of appeals: G. App. to the government's appendix.

[3] Daniel was sentenced in July 1969 (App. 2). Petitioner's sentencing was adjourned at his request (App. 3). The motion to withdraw the plea of guilty was filed in February 1970. (App. 3). Petitioner had been ill during the summer of 1969 while incarcerated under a state sentence (App. 184–186).

(App. 2–3, 8–14). The judge held a hearing on the motion at which government counsel, the F.B.I. agent and petitioner testified. At the conclusion of the hearing, the judge denied the motion to withdraw the plea. The judge found that a great deal was said to petitioner by government counsel and the agent which was ill-advised (App. 346–347), but that petitioner knew what he was doing when he pleaded guilty after the judge had made his own position clear (Pet. 347–348). Noting that he had been particularly frank because the plea had been made in the middle of trial, the judge concluded that petitioner "accepted the risks of his situation with long-headed knowledge that he was in the midst of a difficult situation" (App. 350). On June 12, 1970, the court sentenced petitioner to imprisonment for two years, with eligibility for parole as determined by the Board of Parole, making it explicit that the Attorney General had authority to fix the place of confinement (App. 356–357).[4] The court of appeals found the determination of the district court supported by ample evidence and affirmed (Pet. App. A1–7).

There is no reason to review this factual determination. As the court below held, petitioner was not an uncounseled defendant who could not rationally weigh the advantages of going to trial against the advantages of pleading guilty; he was well aware that the judge was not disposed to accept the recommendations

[4] The judge pointed out that, by the time of sentencing, the question of concurrence was academic since little time remained on the state sentence (App. 349).

of his counsel and government counsel. His plea, knowingly entered with the advice of counsel, was properly found to be voluntary. *Brady* v. *United States,* 397 U.S. 742.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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